St. Rep. 56, which is now overruled by the principal case the Virginia Court saying that the question must now be regarded as settled to the contrary. In addition to the grounds already discussed, these cases are usually based upon the doctrine laid down in *Davis* v. *Patrick,* 141 U. S. 479, 45 L. Ed. 826, that when a promise, though in form to answer for the debt of another, is in reality meant for the benefit of the promisor, it is an original undertaking and not within the statute. It may be doubted whether, apart from the reasons peculiar to indemnity contracts, a surety derives such benefit from having another liable with him on a debt as should bring these cases within this doctrine, but the distinction has often been made between such cases and those discussed above, *Mickley* v. *Hochsleder,* 10 Pa. Co. Ct. R. 345; *Farrell* v. *Maxwell,* 28 O. St. 383, 22 Am. St. Rep. 393; *Hartley* v. *Sandford, supra.* The same principle has controlled other cases where the interest was of a different nature. It is well illustrated by a comparison of the Connecticut cases of *Clements' Appeal,* 52 Conn. 464, and *Smith* v. *Delaney,* 64 Conn. 264, 29 Atl. 496, 42 Am. St. Rep. 181. P. B. B. JR.

WHAT LAW GOVERNS THE LIABILITY ON COMMERCIAL PAPER?—The recent case of *Belestin* v. *First National Bank,* (Mo. App. 1914), 164 S. W. 160, presents a novel question as to the law governing the liability of the drawer of a bill of exchange payable in another jurisdiction.

Plaintiff, living in Missouri, wished to send money to his brother, living in Greece, and bought of defendant bank in Kansas City, Missouri, its draft on a London bank, and on the same day mailed the draft to his brother. The draft was stolen before it reached the addressee, and was presented to the drawee bank, which paid it; the indorsement was in fact a forgery, but the drawee bank believed it to be genuine and paid it in good faith. The purchaser sued the drawer bank in Missouri, where they both lived, for the amount paid for the draft. The defendant set up the statutory law of England, which provides that a bill is discharged by payment in due course by the drawee, and that the drawee is deemed to have paid the bill in due course if he acts in good faith, even though the indorsement of the payee's name is a forgery. The plaintiff claimed the law of Missouri should be applied, which does not allow the good faith of the drawee banker to discharge him if he pays the bill on a forged indorsement. The court held that the bill had been paid according to the law of the place of payment, which must govern as to matters of payment, and hence the drawer as well as the drawee was discharged from any liability.

The controlling principle of the instant case is that the law of the place of performance governs as to matters of performance, and especially "for the purpose of payment and the incidents of payment." In support thereof the case of *Scudder* v. *Union National Bank,* 91 U. S. 406, is cited.

But the question actually before the court in that case was not whether the law of the place of performance should control as to the fact of payment, but only whether a parol acceptance made in Illinois of a draft drawn in that state on a firm in Missouri was to be governed by the law of Illinois,

where acceptance in such form was valid, or by the law of Missouri, where such acceptance was invalid. The court simply decides that the lex loci contractus governs matters of execution, and that the parol acceptance made in Illinois was binding. The statement of the rule in that case that the place of payment governs as to matters of payment is correct, as, for instance, it determines whether days of grace are to be allowed on a sight draft. But all the cases involving the question of payment, and applying the above rule, were dealing with the questions of when and how presentment and demand must be made. They but announce the fundamental rule, seldom controverted, that the time, manner and sufficiency of presentment, demand, protest and notice are to be governed by the law of the place of payment. *Donegan* v. *Wood,* 49 Ala. 242; *Wooly* v. *Lyon,* 117 Ill. 244; *Piner* v. *Clary,* 17 B. Mon. (Ky.) 645; *Commercial Bank* v. *Barksdale,* 36 Mo. 563; *Sylvester* v. *Crohan,* 138 N. Y. 494; *Pierce* v. *Indseth,* 106 U. S. 546. But the question of the necessity of taking these steps is governed by the law of the place of contract. *Amsinck* v. *Rogers,* 189 N. Y. 252, 82 N. E. 134, 121 Am. St. Rep. 858, 12 L. R. A. (N. S.) 875, and note.

In the instant case the contract in dispute is that of the drawer. The opinion assumes as correct the principle laid down by STORY in his work on CONFLICT OF LAWS (8 ed.), § 315, and adopted in *Amsinck* v. *Rogers, supra,* that the drawer does not contract to pay the money in the foreign place on which the bill is drawn, but only guarantees its acceptance and payment in that place by the drawee, and in default of such payment agrees to reimburse the holder in principal and damages according to the law of the place where they respectively entered into the contract. In other words, the rights and liabilities of the drawer are to be governed by the law of the place where he makes his contract and not by the law of the place of payment.

His contract is a conditional one, that he will pay upon the happening of certain things, chief among which are the two of non-payment by the drawee and notice of protest given to him. But the court in the instant case says that the drawer's conditional contract has been discharged by payment and hence the event upon which the conditional liability was to become absolute cannot happen. It determines whether this event has happened, *i. e.,* payment, by the law of the place of payment. It thereby releases the drawer from liability because the law of the place of payment says there has been payment, though the law of the place of the drawer's contract says there has not been payment, at the same time recognizing the established rule that the drawer would be released from liability if, on the dishonor of the bill, the steps required by the law of the place where he contracts were not taken, even though the law of the place of payment did not require this to be done. *Price* v. *Page,* 24 Mo. 65; *Musson* v. *Lake,* 4 How. (U. S.) 262.

But why say that the necessity of taking certain steps upon dishonor of the instrument in order to determine whether the drawer is released from liability is to be governed by the law of the place of drawing, yet the element of payment, which is a step necessary to release the drawer, is to be determined by the law of the place of payment? By such a doctrine the court recognizes the lex loci contractus as governing one part of the

drawer's contract and the lex solutionis as governing the other, which to say the least adds confusion to conflict.

Nor is this a question of the sufficiency of certain steps taken to release the drawer, for the vital point is not whether payment is sufficient, but whether there has been any payment at all. The law of England says there has been a payment, while the law of Missouri says there has not been, so the case simmers down to the question, what law is to govern in determining whether a drawer is discharged from liability upon a draft drawn by him? It seems that the same law should be applied in dealing with this essential to his discharge as is applied in dealing with the requisite of notice of protest to hold him liable.

The decision in the instant case also violates a rule laid down by STORY in his CONFLICT OF LAWS (8 ed.) § 343, that the law of the place where the contract between the particular parties is made will operate, as well in respect to the discharge as to the obligation thereof. This would seem to be a direct answer in the negative to the question propounded by the court as the real question involved, *i. e.*, "Is a payment made according to the law of the place of payment a discharge of the drawer's obligation?"

It will be noted that this case was not decided by a court of last resort, and it will be unfortunate if such a court is not given the opportunity to pass upon the question, for the doctrine as it stands seems to violate an established rule of private international law as applied to commercial paper.

J. S. K.